Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

BRAD FRAUM,

Petitioner,

v.

UNITED STATES OF AMERICA, and
JOHN D. BRADLEY, SPECIAL AGENT,
INTERNAL REVENUE SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a corporate custodian, who is under criminal investigation, can be compelled, absent a grant of immunity, to produce corporate records in response to an Internal Revenue Service summons when a jury would inevitably conclude that he produced the summoned records.

PARTIES INVOLVED

All of the parties in the appeal to the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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The petitioner, Brad Fraum, respondent-appellant below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is not reported. The opinion of the district court (App. C) is not reported.

JURISDICTION

The order of the court of appeals (App. A) was entered on April 26, 1989. A petition for rehearing was denied on June 6, 1989 (App. B). A timely motion for stay of the mandate was filed on June 13, 1989. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . compelled . . . in any criminal case to be a witness against himself. . . .

2. 26 U.S.C. § 7602 (Examination of Books and Witnesses) provides in relevant part:

> (a) Authority to Summon, etc. – For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting such liability, the Secretary is authorized –
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any

other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

Brad Fraum, a chiropractor, conducted his business as a sole practitioner during 1982, 1983 and 1984. Fraum reported the income from his business on joint income tax returns, Form 1040, which he filed with his wife, Sharon. In August 1982, Fraum and his wife filed articles of incorporation for an Arizona corporation, Tempe "Life" Center, Inc. The incorporators and sole directors and officers of the corporation were Brad and Sharon Fraum. The corporate charter of Tempe "Life" Center, Inc. was revoked by the Arizona Corporation Commission in March 1984. During the entire period of the corporation's existence, no corporate income tax returns were filed, and the corporation had no employees.

In 1985, the Internal Revenue Service commenced a civil audit of the Fraum's Form 1040 income tax return for 1982. On August 26, 1986, Brad Fraum was advised that the Internal Revenue Service was conducting an investigation of possible criminal tax offenses. At that time, Brad Fraum was advised by an IRS special agent that he had a Fifth Amendment privilege not to answer any questions, that any documents he provided to the IRS

could be used against him, and that he had the right to confer with counsel.

On February 5, 1987, the IRS special agent served a summons upon Brad Fraum as president of Tempe "Life" Center, Inc. for Fraum's testimony and production of the books and records of the corporation. In response to the summons on March 19, 1987, Fraum, through his counsel, invoked a Fifth Amendment privilege not to incriminate himself through a testimonial act of production, absent a grant of immunity. Neither at the time of the summons appearance or at any time since that date has Fraum stated to the IRS whether the summoned records are in existence or in his possession.

On April 6, 1988, the district court granted a motion for enforcement in a summons enforcement action brought by the government (App. C). Fraum appealed the district court's order to the United States Court of Appeals for the Ninth Circuit. On April 26, 1988, the appellate court affirmed the district court's enforcement of the summons (App. A). Fraum filed a timely petition for rehearing which was denied by an order entered on June 6, 1989 (App. B).

On June 15, 1988, during the time that Fraum's appeal to the Ninth Circuit was pending, the IRS advised Sharon Fraum that she is under criminal investigation for the years 1982, 1983 and 1984.

REASONS FOR GRANTING THE PETITION

This case presents a factual situation which requires application of the exception to the agency rationale enunciated in *Braswell v. United States*, ___ U.S. ___, 108 S. Ct. 2284 (1988). In a five-four decision in *Braswell*, the Court concluded that a corporate custodian's act of production is the act of the corporation and not of the individual; therefore, "a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating." 108 S. Ct. at 2295. Based upon this agency rationale, the Court reasoned that the government may make no evidentiary use of the "individual act" against the individual, but would have the right to use the "corporation's" act of production against the custodian. *Id.* The Court left open "the question of whether the agency rationale supports compelling a custodian to produce corporate records when . . . the jury would inevitably conclude that he produced the records." *Id.* at 2295 n.11.

The appellate court's decision in this case has seriously misconstrued the applicability of this exception to the agency rationale of *Braswell* to a corporate custodian in Fraum's particular factual circumstances. *Braswell* narrowed the act of production protection for corporate custodians; it did not extinguish it. As observed in the dissenting opinion, if the government can compel a named individual to produce records, but in any later proceeding against the individual cannot divulge that he performed the act, it is because the Fifth Amendment protects the person without regard to his status as a corporate custodian. 108 S. Ct. at 2300.

Whether a particular act is testimonial and self-incriminating is still a factual issue to be decided in each case. *Fisher v. United States*, 425 U.S. 391, 410 (1976); *United States v. Doe*, 465 U.S. 605, 613 (1984). By complying with the IRS summons, Fraum would incriminate himself in all the ways discussed by the Court in *Fisher* and *Doe*. Compliance with the summons would compel Fraum to (1) concede the existence of the summoned records; (2) inform the government of the existence of documents of which it is not now aware; (3) make discretionary choices among documents; (4) admit possession and control of the summoned documents; and (5) authenticate all of the records produced. Because Fraum has not produced any records or answered any questions, the existence and location of the summoned records are not foregone conclusions as in *Fisher*. 425 U.S. at 411. Fraum's act of production would be both testimonial and self-incriminating.

The undisputed facts are that Tempe "Life" Center, Inc., did not have any employees, its only officers and directors were Brad and Sharon Fraum (both of whom face the same hazards of self-incrimination), Brad Fraum did not conduct his chiropractic practice through the corporation, and the corporation did not file income tax returns. In this case, where the only individuals who could identify and produce the summoned records are Brad and Sharon Fraum, their identity of interest would lead a jury to the inevitable conclusion that one or both produced the records, bringing them squarely within the exception to the collective entity rule recognized by the Court in *Braswell*, 108 S. Ct. at 2295 n.11.

Petitioner is unaware of any other case in which a court has been requested to apply the *Braswell* exception to the collective entity rule. However, it is only a matter of time before a corporate custodian in circumstances similar to Fraum's situation will request such application. In view of the Court's specific recognition of the exception to the rule, review of the decision below is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1989

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; JOHN D. BRADLEY, Special Agent, Internal Revenue Service,	C.A. No. 88-2582
	D.C. No. CV-88-0165-WPC
Petitioners-Appellees,	MEMORANDUM*
v.	
BRAD FRAUM,	
Respondent-Appellant.	

On Appeal From the United States District Court
for the District of Arizona
William P. Copple, District Judge, Presiding

Argued and Submitted April 12, 1989
San Francisco, California

Before: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

Brad Fraum appeals from the district court's order rejecting Fraum's claim of a fifth amendment privilege and enforcing an IRS summons for the records of Tempe

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Life Center, Inc. "Whether the enforcement of the summons violates constitutional rights is a question of law, and reviewed de novo." *Tornay v. United States*, 840 F.2d 1424, 1429 (9th Cir. 1988). We affirm.

The IRS began a civil investigation of Fraum's tax affairs in 1985. A criminal investigation ensued. In 1987 the IRS issued a summons to Fraum to produce the business records of Tempe Life. Fraum failed to produce the records and the IRS petitioned for enforcement. Fraum contends that enforcement of the summons infringes upon his right not to incriminate himself, as guaranteed by the fifth amendment. We cannot agree.

The disposition of this case is squarely controlled by *Braswell v. United States*, 108 S.Ct. 2284 (1988). In *Braswell*, the taxpayer, Randy Braswell, was the sole shareholder of the corporation. The taxpayer's wife and mother were directors and officers of the corporation. Braswell resisted an IRS summons directed against the corporation and asserted that the fifth amendment prohibited enforcement of the summons because the act of producing the documents was personally incriminating. The Supreme Court rejected this argument and held that "a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating." *Id.* at 2295. The court left open the question of whether the same result would apply if the taxpayer was the sole employee and officer of the corporation. *Id.* at 2295 n. 11.

The district court found that Fraum and his wife Sharon were the incorporators, directors and officers of Tempe Life. While *Braswell* involved a corporation with

three officers and Tempe Life has only two, we see no principled way to distinguish the facts of *Braswell* from the facts of this case. Fraum simply does not come within the question left open by the Supreme Court in *Braswell*. Accordingly, we affirm the district court's denial of Fraum's claim of fifth amendment privilege.

AFFIRMED.

APPENDIX B

[FILED JUN 6, 1989]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; JOHN D. BRADLEY, Special Agent, Internal Revenue Service, Petitioners-Appellees, v. BRAD FRAUM, Respondent-Appellant.	C.A. No. 88-2582 D.C. No. CV-88-0165-WPC ORDER

Before: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

Appellant's petition for rehearing is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA; JOHN D. BRADLEY, Special Agent, Internal Revenue Service, Petitioners, vs. BRAD FRAUM, Respondent.	)	NO. CIV 88-0165-PHX-WPC

On January 28, 1988, the government filed a petition with this Court to enforce an Internal Revenue Service (IRS) summons. On February 28, the respondent, Mr. Fraum, moved this court to dismiss the petition for enforcement of summons. An oral argument on the defendant's motion to dismiss and the Court's order to show cause was held on April 1, 1988.

I. *BACKGROUND*

Mr. Fraum is a chiropractor (Transcript of Hearing at 3). On August 18, 1982 articles of incorporation were issued by the Arizona Corporation Commission for Tempe Center, Inc. (Transcript at 4); Fraum was the President and a shareholder (Petition at 3). The articles were revoked on March 10, 1984 because the corporation failed to file annual statements with the Corporation Commission. (Transcript at 4). There were no corporate income

tax returns filed (Transcript at 18), although Tempe Center, Inc. did file employment tax returns which showed no employees (Transcript at 19).

In 1985 the IRS began a civil examination of Fraum's Form 1040 individual tax return for 1982, focusing on Schedule C which listed income from business and profession and identified his main business activity as chiropractic (Transcript at 2-3).

On August 26, 1986 Special Agent Bradley (Bradley) informed Fraum that he had been assigned to conduct an investigation for possible criminal tax offenses (Motion to Dismiss at 2). On February 5, 1987 Bradley served the subject summons on Brad Fraum as President of "Tempe Life Center, Inc.," requesting production of various records pertaining to the corporation (Motion at 2-3). On March 19, 1987 Fraum's attorney advised Bradley that Fraum exercised his constitutional rights and refused to testify or produce for examination any of the summoned records, absent a grant of immunity (Motion at 3).

Essentially, Fraum argues that Tempe Life Center, Inc.'s status as a corporation is in question, and that compliance with the summons would tacitly acknowledge that the corporation existed and that there was a failure to file corporate income tax return[s]. Therefore, Fraum has invoked the Fifth Amendment so as not to incriminate himself.

II. *ANALYSIS*

Fraum argues that the status of the corporation is in question, and has attached affidavits to his motion to

support his contention that Bradley indicated in a meeting in January 1987 that it was the government's belief that the corporation did not transact any business and that Fraum was engaged in his professional practice as a sole proprietor (Motion, Exhibits B, C and D). Apparently Bradley would testify that he did not make such a statement (Motion for Summary Enforcement at 9). Even if Fraum's version is correct, it is irrelevant. If the corporation did transact business, as soon as the IRS made that determination it could pursue the records of the corporation regardless of what may have been said earlier.

Fraum cited the case of *United States v. Carlson*, 617 F.2d 518 (1980) as support for his position that the failure of the corporation to file tax returns makes the production of any corporate records incriminating (Transcript at 17). That case is inapposite, as it concerned an individual taxpayer involved in a tax-evasion scheme who claimed 99 exemptions then asserted the Fifth Amendment on his year-end tax return and refused to file. This court notes, however, that the taxpayer was *not* permitted to stand on the Fifth Amendment privilege as a device to withhold information upon which his tax liability could be determined.

To be enforceable judicially, an IRS summons must be issued for a proper purpose, seek information relevant to that purpose, seek information not currently in the Government's possession, and satisfy all of the administrative steps regarding issuance and service of the summons. *United States v. Powell*, 379 U.S. 48 (1964). Fraum has not submitted any evidence which contradicts the *Powell* requirements, but rather relied on the affirmative defenses raised in his motion to dismiss.

It is well settled that an individual may not assert a Fifth Amendment privilege on behalf of the corporation. As stated by the Supreme Court in *Bellis v. United States*, 417 U.S. 85, 88 (1974):

> [A] long line of cases has established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.

While courts have recognized that in certain limited circumstances the act of production of subpoenaed records can have testimonial aspects which can be protected by the Fifth Amendment, *See*, e.g. *United States v. Doe*, 465 U.S. 605 (1984), the Ninth Circuit has found that the privilege does not apply to corporate recordkeepers. *United States v. Vallance*, 793 F.2d 1003 (9th Cir. 1986); *United States v. Malis*, 737 F.2d 1511 (9th Cir. 1984). This was most recently affirmed in *United States v. Alden*, No. 83-2036, slip op. (9th Cir. February 19, 1988), which held that a physician may be held in contempt for failing to obey a court order to give testimony and to comply with summonses of the IRS to produce records of a corporation of which the physician was President and the sole stockholder.

In this case, *Alden* controls. The documents sought by the IRS are corporate records. The summons was directed to Fraum in his representative capacity as President of Tempe Life Center, Inc. (Petition, Exhibit A). Fraum admits that articles of incorporation were issued on August 8, 1982 and not revoked until March 10, 1984 (Transcript at 4). Fraum also acknowledges that certain purchases were made by the corporation (Transcript at

14), and that Form 940's showing no employees were filed with the IRS (Transcript 19). Thus, the evidence demonstrates that a corporation existed, and Fraum must produce the requested records in his capacity as President of Tempe Life Center, Inc.

In addition to being unsupported by the law of this circuit, Fraum's position is nonsensical. If a taxpayer could form a corporation, transact business under the corporation's name, fail to file an income tax return and then stand on the Fifth Amendment and be permitted to withhold records which would establish corporate income, then the IRS's ability to assess and collect taxes would be seriously impeded. While that may not be this case, the IRS is entitled to examine the corporate records and made that determination.

For the foregoing reasons, IT IS ORDERED:

1. The respondent's Motion to Dismiss Petition for Enforcement of Summons is denied.

2. The petitioner's Motion for Summary Enforcement is granted.

3. The respondent shall comply with the petitioner's summons within fifteen (15) days of the receipt of this order.

DATED this 6 day of April, 1988.

/s/ Wm. P. Copple
Wm. P. Copple
United States District Judge